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Supreme Court, U.S.
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In The

# Supreme Court of the United States

WILLIAM J. TWAY AND ROBERT T. FORD,

*Petitioners,*

vs.

THE UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI OF WILLIAM J. TWAY AND ROBERT T. FORD

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioners were denied due process of law (a) by the failure of the United States Court of Appeals for the Ninth Circuit to consider and apply its precedent holding that 26 U.S.C. §§ 7206(2) does not apply to a case in which there is no tax liability and (b) by the failure of the Ninth Circuit Court of Appeals to consider and apply the precedents of this Court holding that due process is denied by a conviction based on inferences that were irrational and had the effect of shifting the burden of proof to Petitioners.

2. Whether the failure of the Court of Appeals to address the issues presented so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

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## OPINIONS BELOW

The indictment charged violations of 18 U.S.C. § 371 (conspiracy) and 26 U.S.C. §§ 7206(1) and (2) (defrauding the Internal Revenue Service in the ascertainment and collection of tax revenue). The United States District Court simply made a general finding of guilt relating to the charged offenses on April 25, 2007. App. 6, 7. Formal findings had been waived. There was no opinion.

A panel of the Ninth Circuit Court of Appeals affirmed the judgment of the District Court in an unpublished disposition filed May 15, 2009. App. 1-5.

Rehearing and rehearing *en banc* were denied summarily on June 23, 2009. App. 8-9.

## STATEMENT OF THE BASIS FOR JURISDICTION

The jurisdiction of the District Court was founded on 18 U.S.C. § 3231 conferring power on the court to adjudicate federal criminal cases.

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 providing that the courts of appeals shall have jurisdiction over all final decisions of the federal district courts.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 providing for review of cases in the courts of appeals by writ of certiorari.

## CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, Amendment V: "No person shall . . . be deprived of life, liberty or property, without due process of law. . . ."

U.S. Constitution, Amendment XIV: " . . . Nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

18 U.S.C. § 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be [guilty of an offense against the United States].

26 U.S.C. § 7206: Fraud and false statements.

> Any person who . . . (2) . . . Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . . shall be guilty of a felony. . . .

## STATEMENT OF THE CASE

William J. Tway and Robert T. Ford assert that they were convicted on evidence that shows their conduct was not a violation of law inasmuch as their conduct did not implicate tax revenue, and the pertinent statute requires such a connection. They also contend that their convictions were based on inferences that do not meet the requirements of Due Process of Law set out in the decisions of this Court.

The panel decision in the Ninth Circuit Court of Appeals did not address these issues, which were extensively briefed on appeal. The Court of Appeals denied rehearing *en banc*.

Tway was charged by indictment with violating 26 U.S.C. § 7206(2) (aiding and abetting the defrauding and impeding of the Internal Revenue Service in the collection of taxes) and 18 U.S.C. § 371 (conspiracy with co-defendant Robert Ford to violate the statute.) Ford was charged with conspiracy and with violation of 26 U.S.C. § 7206(1) (filing false returns).

The prosecution grew out of the founding of an organization known as Free Speech Foundation. The organization obtained tax-exempt status and sometime later began conducting bingo games under Idaho law. The organization gave grants to Tway and Ford for the production of a book on legal self-defense and provided certain scholarships as part of their program services. The grants were disclosed on the tax-exempt returns filed by the organization,

although Tway and Ford were not specifically identified as recipients.

The government theorized that Tway and Ford had obtained tax-exempt status for Free Speech Foundation in order to obtain a state bingo license, notwithstanding that state law made such licenses available to any non-profit organization whether tax-exempt or not. According to the government, Tway and Ford, through their accountant, filed tax-exempt returns that misstated the amounts of money devoted by the organization to program services as part of a scheme to enrich themselves personally. These *tax-exempt returns* were the basis of the government's claim that the defendants had impaired the government's ability to collect taxes. There was direct evidence that inaccurate program services figures on the tax-exempt returns were the product of honest error and that the program services money had been disbursed as reported. The government's evidence of conspiracy and willful filing of false returns with the objective of depriving the government of tax revenue was based wholly on inference. The inferences of guilt were based on Ford's name on the returns, the loss of records of the organization, the use of cash payments for program services, the erroneous claim that the organization needed tax-exempt status in order to maintain a state bingo license, financial benefits through the research grants to Tway and Ford, and the government's assertion that it had difficulty in its effort to document program services expenditures.

The District Court, which heard the case without a jury, chose, without explanation, to believe the testimony of witnesses only to the extent that such evidence favored the government's position.

Ford was convicted of conspiracy and acquitted of charged violations of 26 U.S.C. § 7206(1). App. 7. Tway was convicted of conspiracy and of aiding and abetting under 26 U.S.C. § 7206(2) (defrauding the government in matters arising under the internal revenue laws).

Petitioners appealed and their cases were consolidated for review. Ford did not file a separate brief but instead relied on Tway's brief.

The panel of the court of appeals that heard the case affirmed the convictions in a not-for-publication memorandum filed May 15, 2009. Appellant's claim that 26 U.S.C. § 7206(2) could not, consistently with the court's precedent, be applied to the facts of the case was not directly addressed. The court did not discuss or cite Ninth Circuit cases or the cases of this Court holding that effect on tax revenue is pre-requisite to a conviction under 26 U.S.C. § 7206(2). The panel also failed to address Petitioners' argument that their right to Due Process of Law was violated by the trial court's improper use of inference to furnish proof of guilt and did not mention or discuss any of the cases cited by Petitioners in support of the point.

Petitioners filed a timely petition for rehearing *en banc* which was summarily denied on June 23, 2009. App. 8-9.

## ARGUMENT

**1. Due Process of Law required consideration on the merits of Petitioners' claims that 26 U.S.C. § 7206(2) was not applicable to the conduct charged and they were convicted on the basis of impermissible inference.**

The right of appeal becomes essentially meaningless if a federal appeals court is permitted to ignore defendants' claims, supported by binding precedent, that the statute under which they were convicted does not apply to the conduct proved by the government and that the government's case was founded solely on irrational inferences not comporting with constitutional guarantees.

The Court has held that although the Constitution does not provide a right of appeal from a criminal conviction, when a system of appeals is created by legislation, the government, through its courts, must act in conformity with the requirements of the Constitution. *Evits v. Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985). Accordingly, the Court held that a state rule barring an appeal deprived the defendant of the fair appellate process demanded by the Constitution.

Congress has legislated a system of appeals. 28 U.S.C. § 1291. The decision in *Evits* seems clearly to contemplate that in order to satisfy the Due Process Clause a fair and effective system of appeals must include consideration on the merits of legal claims that would result in setting aside the Petitioners' convictions.

The tax statute on which Petitioners' convictions were based does not apply to Petitioners' conduct. Tax liability or effect on tax revenue is the crux of a violation of 26 U.S.C. § 7206(2). The Ninth Circuit made the point clearly in *United States v. Salerno*, 902 F.2d 1429 (9th Cir. 1990): "The law requires specific intent to defraud the I.R.S. and this means that the government must prove not only *that the defendant's conduct affected tax revenue*, but that tax fraud was an objective. . . ." 902 F.2d at 1433 (emphasis added). The same view of the statute is taken in other circuits. See: *United States v. Adkinson*, 158 F.3d 1147 (11th Cir. 1998); *United States v. Foy*, 794 F.Supp. 835 (M.D. Tenn. 1992). This Court has repeatedly held that conviction of a willful violation of section 7206(2) depends upon proof linking the defendants' conduct to the evasion of taxes. *United States v. Bishop*, 412 U.S. 346, 93 S.Ct. 2008 (1973); *Ingram v. United States*, 360 U.S. 672, 79 S.Ct. 1314 (1959); *Spies v. United States*, 317 U.S. 492, 63 S.Ct. 364 (1943).

There was no evidence whatsoever that the actions of the defendants affected tax revenue. To the contrary, there was direct and uncontradicted

evidence that Free Speech Foundation, as a tax-exempt entity, would not have had a tax liability in the relevant time period even if it had not been tax-exempt. The issue was addressed in the Court of Appeals as an aspect of Petitioners' argument that the evidence was insufficient to support the convictions. App. 10. Reliance was placed on *Salerno*, *supra* and related cases cited above.

In short, Tway was convicted of impairing the government's ability to collect tax revenue it did not have coming and Ford was convicted of conspiring to achieve the same end. It is not relevant, as the panel believed, whether Tway and Ford created Free Speech Foundation to facilitate personal gain if their actions were lawful. The statute was stretched to cover circumstances not defined as criminal by Congress. The Court of Appeals was obligated to apply *Salerno* to the facts of the case and it did not do so.

**2. Proof by Irrational Inference denies the right to Due Process of Law.**

This Court has held that the elements of conspiracy and an underlying offense may not be proved solely by inference unless the inferences are rational and exclude every reasonable hypothesis of innocence.

In *Barnes v. United States*, 412 U.S. 837, 93 S.Ct. 2357 (1973) the Court held that inferences of guilt do not meet due process standards if they are irrational or arbitrary. A "rational" inference presupposes that

"' ... it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.'" *Id.*, quoting *Leary v. United States,* 395 U.S. 6, 36, 89 S.Ct. 1532, 1548. See also: *United States v. Rubio-Villareal,* 967 F.2d 294 (9th Cir. 1992) (*en banc*). Inferences of guilt must also be based on evidence sufficient to permit finding the inferred fact beyond reasonable doubt. *Barnes, supra,* 412 U.S. at 843, 93 S.Ct. at 2361-2362. See also: *County of Ulster County, New York v. Allen*, 442 U.S. 140, 99 S.Ct. 2213 (1979).

The government's proof conspiracy and the underlying offense rested solely on the lawful destruction of old records, mere association of Tway and Ford in providing information to the tax preparer and in creating the organization, receipt of grant money, multiple bank accounts, and the use of cash transactions. In each such instance, the evidence failed to exclude reasonable explanations of innocence. Moreover, direct evidence of innocence was ignored. With respect to the conspiracy charge, there was not a shred of evidence of an agreement to defeat the lawful functions of the IRS with knowledge of illegal purpose and the specific intent to affect tax revenue. See *Salerno, supra.* The use of inference, and the trial court's reliance on it, defeated the defendant's right to due process of law. The panel's omission to consider and apply the governing authority of this Court's cases deprived Petitioners of fair appellate process.

In addition, the government's reliance on the loss and lawful destruction of old records had the effect of

casting on Tway and Ford the burden of proving themselves innocent in violation of the Due Process Clause. See *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241 (1943). The panel decision and the denial of rehearing *en banc* are contrary to decisions of this Court.

Certainly one premise of the rule of law is that a litigant who raises important legal objections to a criminal conviction is entitled to have them considered on appeal. An unpublished panel decision that fails to consider claims that a conviction rested on an inapplicable statute and on impermissible inferences creates a precedent that avoids giving force to binding principles of law.

**3. This Court has inherent supervisory power that should be exercised in this case.**

The Court has the inherent power to formulate procedural rules to remedy the violation of recognized rights. *United States v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974 (1983); *McNabb v. United States*, 318 U.S. 332 (1943). Rule 10 of this Court's Rules provides that good cause for the exercise of such power is a basis for review by writ of certiorari.

The petitioners were convicted on irrational inference under a statute not applicable to their conduct. As the Court pointed out in *Hasting, supra,* the purposes underlying the use of supervisory powers are to implement remedies for the violation of recognized rights and to promote judicial integrity to

ensure that convictions rest on valid considerations. Petitioners suggest that the Court of Appeals for the Ninth Circuit has so far departed from acceptable practice by ignoring dispositive issues as to call for the exercise of this Court's supervisory power.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LYNN E. THOMAS
*Attorney for William J. Tway*
MARTIN J. MARTELLE
*Attorney for Robert T. Ford*

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
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| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>ROBERT T. FORD; WILLIAM J. TWAY,<br>Defendants-Appellants. | No. 06-30553<br>D.C. No. CR-06-00080-1-BLW<br>MEMORANDUM*<br>(Filed May 15, 2009) |

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|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>WILLIAM J. TWAY,<br>Defendant-Appellant. | No. 07-30282<br>D.C. No. CR-06-00080-2-BLW |

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|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v. | No. 07-30301<br>D.C. No. CR-06-00080-BLW |

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

ROBERT T. FORD,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Argued and Submitted May 5, 2009
Seattle, Washington

Before: WARDLAW, PAEZ and N.R. SMITH, Circuit Judges.

We affirm the convictions of William Tway and Robert Ford ("Appellants") on charges relating to the filing of false returns with the Internal Revenue Service (IRS). Appellants waived their right to a jury trial and their right to have the trial judge make specific findings of fact and conclusions of law. After a bench trial, each Appellant was convicted of conspiracy to file false returns and/or defraud the United States, in violation of 18 U.S.C. § 371. Tway was also convicted of two counts of aiding and advising the filing of false returns, in violation of 26 U.S.C. § 7206(2). Appellants raise claims of (1) sufficiency of the evidence, (2) pre-indictment delay, (3) improper pre-trial amendment of the indictment, (4) sufficiency of the indictment, and (5) prosecutorial misconduct.

Viewing the evidence in the light most favorable to the prosecution, as we must, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1224 (9th Cir. 2007), there was

sufficient evidence to convict each Appellant of the conspiracy charge and Tway of the aiding and advising charges. Giving the evidence every reasonable inference in favor of the government, the trial judge could have rationally concluded that Appellants agreed to organize the foundation and manage its affairs to create a Source of non-taxable revenue from which Appellants personally benefitted. The judge could also have concluded that the Appellants managed the foundation and their own personal affairs with the intent of concealing their gain. Because Appellants provided all of the information used to prepare the Form 990s but did not disclose that they personally received grants, the court could have rationally concluded that Appellants knowingly omitted information or reported false information to the IRS on the Form 990s in an effort to conceal facts that would jeopardize the foundation's tax-exempt status or state bingo license.

The trial judge properly considered all relevant evidence and was within his discretion to weigh the persuasiveness and credibility of the defense evidence presented. *See Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999).

Appellants have waived the issue of pre-indictment delay by not raising it before trial. *United States v. Andros*, 484 F.2d 531, 533 (9th Cir. 1973) (failure to raise before trial a claim that pre-indictment delay resulted in a violation of Fifth Amendment due process is waived) (citing *Benson v. United States*, 402 F.2d 576 (9th Cir. 1968)).

Nonetheless, Appellants have failed to show actual prejudice resulting from any pre-indictment delay. *See United States v. Valentine*, 783 F.2d 1413, 1416-17 (9th Cir. 1986). Proof of prejudice "must be definite and not speculative, and the defendant must demonstrate how the loss of a witness and/or evidence is prejudicial to his case." *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985) (citations omitted). "[T]he mere absence of records [due to the passage of time] is not enough to establish actual prejudice." *United States v. Corona-Verbera*, 509 F.3d 1105, 1113 (9th Cir. 2007) (citing *United States v. Manning*, 56 F.3d 1188, 1194 (9th Cir. 1995)).

The government's pre-trial amendment of the indictment was a non-material amendment to correct a typographical error. *United States v. Lim*, 984 F.2d 331, 337 (9th Cir. 1993). It did not alter the elements of the charged offenses or change the facts that would have to be proven at trial. Therefore, it did not result in a material variance or a constructive amendment of the indictment. *See United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984).

The indictment was sufficient to give Appellants adequate notice of the charges against them. It contained a "'plain, concise, and definite written statement of the essential facts constituting the offense charged,'" *United States v. Awad*, 551 F.3d 930, 935 (9th Cir. 2009) (quoting Fed.R.Crim.P. 7(c)(1)).

The district court did not abuse its discretion in denying Appellant's motion to dismiss the indictment for prosecutorial misconduct before the grand jury. *See United States v. Eden*, 659 F.2d 1376, 1382 (9th Cir. 1981). To the extent that the government misstated Idaho law, it was a minor misstatement on a matter that is collateral to the offenses actually charged in the indictment. This alleged misstatement was not excessive, flagrant, scandalous, or so offensive as to violate due process and therefore does not rise to the level of prosecutorial misconduct. *See United States v. Edmonds*, 103 F.3d 822, 825-26 (9th Cir. 1996). Further, given the guilty verdict, any prosecutorial misconduct before the Grand Jury is harmless beyond a reasonable doubt, because the guilty verdict substantiates the finding of probable cause made by the Grand Jury. *See United States v. Mechanik*, 475 U.S. 66, 70 (1986) (supervening guilty verdict renders any prosecutorial misconduct before the Grand Jury to be harmless).

**AFFIRMED.**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | Case No. CR 06-00080-S-BLW |
| Plaintiffs, | ) | GENERAL FINDING |
| v. | ) | |
| WILLIAM J. TWAY, | ) | |
| Defendants. | ) | |

The undersigned Judge finds beyond a reasonable doubt Defendant,

WILLIAM J. TWAY

**Guilty** of violating Section 371, Title 18, United States Code as charged in Count One of the Indictment, as Amended;

**Guilty** of violating Section 7206(2), Title 26, United States Code as charged in Count Three of the Indictment as Amended; and

**Guilty** of violating Section 7206(2), Title 26, United States Code, as charged in Count Five of the Indictment as Amended.

DATED: April 25, 2007

/S/
ROBERT J. TIMLIN
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | Case No. CR 06-00080-S-BLW |
| Plaintiffs, | ) | GENERAL FINDING |
| v. | ) | |
| ROBERT T. FORD, | ) | |
| Defendants. | ) | |

The undersigned Judge finds beyond a reasonable doubt Defendant,

ROBERT T. FORD

**Guilty** of violating Section 371, Title 18, United States Code as charged in Count One of the Indictment, as Amended;

**Not Guilty** of violating Section 7206(1), Title 26, United States Code as charged in Count Two of the Indictment as Amended; and

**Not Guilty** of violating Section 7206(1), Title 26, United States Code, as charged in Count Four of the Indictment as Amended.

DATED: April 25, 2007

/S/
ROBERT J. TIMLIN
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>ROBERT T. FORD; et al.,<br>Defendants-Appellants. | No. 06-30553<br>D.C. No. CR-06-00080-1-RJT<br>District of Idaho, Boise<br>**ORDER**<br>(Filed Jun. 23, 2009) |

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|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>WILLIAM J. TWAY,<br>Defendant-Appellant. | No. 07-30282<br>D.C. No. CR-06-00080-2-BLW<br>District of Idaho, Boise |

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|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>ROBERT T. FORD,<br>Defendant-Appellant. | No. 07-30301<br>D.C. No. CR-06-00080-BLW<br>District of Idaho, Boise |

Before: WARDLAW, PAEZ and N.R. SMITH, Circuit Judges.

The panel denies the joint petition for panel rehearing and petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

## Statement of Issues Presented for Review in the United States Court of Appeals for the Ninth Circuit

United States v. Tway

CA 06-30553

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I. Whether the evidence supporting Tway's convictions for conspiracy and aiding and abetting the filing of false returns is sufficient.

II. Whether the trial court erred by ignoring uncontroverted evidence of innocence without explanation.

III. Whether Tway's right to Due Process of Law was violated by the trial court's reliance on inferences arising from actions beyond the time records were required to be kept and whether he was prejudiced by preindictment delay in violation of his right to Due Process of Law.

IV. Whether there was a material variance and constructive amendment of the indictment.

V. Whether the indictment was insufficient.

VI. Whether Tway was entitled to dismissal of the indictment for reason of prosecutorial misconduct in wrongly informing the grand jury that Idaho law required bingo revenues to be devoted to charity.

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